The United States and Global Human Rights Imagination

Mark Philip Bradley
The University of Chicago

In the spring of 1946, Orsel and Minnie McGhee turned to the Detroit Branch of the National Association for the Advancement of Colored Persons (NAACP) for some help. A group of white property owners in northwestern Detroit had gone to the Circuit Court for Wayne County to oust the McGhees, who were African-American, from the home that they had purchased some ten years earlier. The case rested on a racially restrictive covenant adopted by white homeowners that no property in the neighborhood "shall be used or occupied by any persons except those of the Caucasian race." Among the signatures on the covenant were those of the white couple who had sold their home to the McGhees. Two Detroit based African-American attorneys, both members of the NAACP's National Legal Committee, took the case. The Circuit Court ruled against the McGhees.[1]

The McGhee's attorneys appealed their case to the Supreme Court of Michigan. In *Sipes v. McGhee*, their appellant brief emphasized the ways in which the lower court ruling was contrary to what they termed "sound public policy." To support this argument, the brief gave sustained attention to the decision of the neighboring Ontario High Court *In re Drummond Wren* which refused to enforce a restrictive covenant against Jews as it violated the human rights provisions of the United Nation Charter which Canada had recently ratified. The relevance of the opinion in the *Wren* case, the brief continued, was reinforced "by the wide official acceptance of the international policies

and declarations frowning on the type of discrimination which the covenant would seem to perpetuate."[2]

At the same moment that the McGhee's battled Detroit's racially restrictive convenants for the right to remain in their home, Kajiro Oyama challenged the State of California's appropriation of property he had bought for his son. Oyama was a Japanese national who had lived in the United States for more than thirty years but by federal naturalization law was ineligible for American citizenship. Oyama purchased the property in question in the mid 1930s under his son's name, Fred, who was six at the time and an American citizen. At issue in the case was the California Alien Land Law that prohibited resident aliens from owning agricultural land in the state; in its real effect the law was directed at persons of Japanese descent. While it was possible for resident aliens to arrange for gifts of land to their citizen children, the state of California made it as difficult as possible to do so. As it happened, the state had enacted a new reporting requirement during World War II with which Oyama had failed to comply in large measure because he and his family were among the many Japanese-Americans "detained" in concentration camps during the war.[3]

In *Oyama v. California*, the Oyama's attorneys argued before the California Supreme Court that the Alien Land Law was a "discriminatory law denying Japanese aliens, solely because of their race, the rights vouchsafed to all others, aliens and citizens." To support these claims, the brief argued, that the California law "flaunts, for all the world to see, a conflict with the Charter" of the United Nations. Like the McGhee case in Michigan, the Oyama's brief underscored its claims that the human rights provisions of the UN Charter provided grounds to strike down the Alien Land Law with

reference to the Ontario High Court's decision *In Re Drummond Wren* to refuse to enforce a restrictive convenant against Jews.[4] Both the Japanese American Citizens League and the California chapter of the American Civil Liberties Union (ACLU) filed *amicus curiae* briefs in the case that made similar UN Charter claims.[5]

Sipes v. McGhee and *Oyama v. California* were the first of an escalating series of cases that made their way through American courts in the late 1940s and employed the novel legal argument that the controlling authority of international human rights norms trumped existing federal and state laws. Most often they pointed to the language of the UN charter itself, and its promises of protections for individual human rights across national borders. Brought by Japanese American, African American and Native American plaintiffs, these cases used a transnational frame to approach a variety of instances of domestic racial discrimination: in housing, in land and fishing rights, in public accommodations, in education and in one case where a dead body could come to rest.[6] Together, they marked the first instance after 1945 of global human rights norms entering directly into American political and juridical processes.

With a few exceptions human rights have until recently been written out of the U.S. international history literature where a Cold War lens tended to render transnational rights talk as at best an auxiliary story to what was seen as the more significant Soviet-American geopolitical struggle. This marginalization has been reinforced by the potency of American exceptionalism which has seen the United States as an exemplary instantiation of the protection and enforcement of human rights at home and as always reticent, and implicitly justifiably so, to allow international norms to intrude into the sovereign space of the nation.[7] One way of reading the global rights cases of the late

1940s –focusing on their immediate outcomes– could reinforce these prevailing perspectives.

Notwithstanding their expansive claims and the ways they pushed against more rigid notions of national sovereignty, the cases themselves never brought a clear resolution to the appropriate balance between global norms and domestic policy. No single U.S. Supreme Court decision in this period granted full legitimacy to their arguments. Moreover, these cases unleashed a storm of controversy, becoming a central symbol for those American policymakers who sought to severely limit U.S. participation in an emerging global rights order. These efforts were successful (at least in the immediate moment) and forced a virtual disavowal of global rights norms in American domestic space by the Eisenhower Administration in the mid-1950s. All this could this could be read as confirmation that traditionally minded notions of American sovereignty ultimately trumped more elastic visions of human rights and sovereignty that located guarantees of individual rights outside the bounds of the nation-state. In these senses, the global rights cases might be thought of as something of an anomaly: rare exceptions that ultimately proved the exceptionalist rule of the impermeability of the American state to transnational forces.

My approach to these cases has a different analytical aim in mind –one focused on *processes* rather than outcomes– to explore how they reveal in microcosm the contested and contingent nature of American engagement by both political elites and local actors in global human rights politics. In exploring the microhistories and larger meanings of these cases, I concentrate on three issues: the nature of the global rights claims made in them and the conditions that made such claims possible (and plausible) in an American

context often thought to be so bounded by human rights exceptionalism; the impact of the these cases on emerging official U.S. hostility in the early 1950s to global norm-making on human rights; and the ways in which a focus on process and a longer historical perspective points us toward the lingering potency of the place and power of non-state transnational rights claims in global and American cultural politics in the 1970s and beyond.

Conditions of Possibility

As the global human rights cases of the late 1940s moved to the state and federal appellate levels, a number of the state and non-state actors who supported the petitioners also looked to the authority of global human rights norms to combat racial discrimination at home. The first mention at the national level of employing UN human rights Charter provisions to combat instances of domestic discrimination emerged in an NAACP conference on racial covenants in July 1945, just a month after deliberations over the UN Charter in San Francisco were completed. As part of far-reaching conversations about legal strategies for attacking racial covenants, participants discussed the relevance of UN Charter claims both for domestic public policy arguments and for exploiting public opinion to their advantage.[8] The potentialities of the UN Charter for the realization of domestic civil rights also surfaced in the deliberations of President Truman's Committee on Civil Rights. Its celebrated final report, *To Secure These Rights*, put forward what it termed a "strong argument" that U.S. ratification of the UN Charter and its human rights provisions gave Congress treaty power to protect domestic civil rights.[9]

A variety of non-governmental advocacy groups –including the NAACP, the American Jewish Congress, the National Lawyer's Guild, the ACLU, the Japanese-American Citizen's League, and the American Association for the United Nations– shared the views of the Commission and lent vocal support to the global rights cases in *amicus* briefs when they came before state and federal courts on appeal.[10] The state itself adopted the global rights arguments of the petitioners in the restrictive covenants cases, which as they moved to the U.S. Supreme Court were collapsed under the rubric of *Shelley v. Kraemer*. Along with claims rooted in domestic practice and constitutional law, the *amicus* brief prepared by Attorney General Tom C. Clark and Solicitor General Philip B. Perlman in *Shelley* drew specific attention to American support of international human rights agreements to argue that racially restrictive covenants were inconsistent with the public policy of the United States. The brief highlighted the preamble and articles 55 and 56 of the UN Charter that dealt with human rights protections, reminding readers of the Charter's approval as a treaty by the U.S. Senate in 1945.[11]

How did the petitioners, their lawyers, a host of non-state actors and at times even some agents of the state come to look outside the nation to global rights norms as a powerful tool to combat domestic racial discrimination? And why did they believe that American judges might be receptive to such transnational legal claims?

The global rights cases of the late 1940s emerged against an extremely fluid political moment following World War II at home and abroad. Scholars of the African American, Mexican American, Native American and Asian American history have devoted significant attention to the struggle for civil rights in the wartime and immediate postwar period. But if civil rights social movements and litigation were clearly ascendant

on the domestic political stage, the kinds of claims that would be advanced and recognized were far more complex and contingent than previous scholarship has acknowledged. As Jacquelyn Dowd Hall has recently argued, a scholarly and popular fixation on *Brown v. Board* as the foundational genealogy for the civil rights movement has obscured the varied scope and significance of its discourse and practices in the 1940s in which calls for workplace democracy, union wages, fair and full employment, universal health care and affordable housing were just as common as (and seen as complementary to) demands for political enfranchisement and educational equity. In this emergent and more capacious conception of the domestic politics of civil rights, invocations of UN Charter provisions on human rights should be seen as a part of a broader and diverse, if understudied, repertoire of rights claims advanced in the postwar period.[12]

As the struggle for civil rights at home accelerated in the wartime and immediate postwar periods, parallel developments in the international sphere produced an unprecedented series of transnational declarations, covenants and conventions to codify human rights norms. The adoption of the UN Charter in 1945 and the UN Declaration of Human Rights in 1948, which articulated global human rights norms and duties that sought to protect individual civil and political rights and promote collective economic and social well-being, were the most dramatic instantiation of a far wider phenomena. In Latin America, delegates at several Pan-American congresses during World War II adopted a regional human rights vocabulary that anticipated the Universal Declaration and culminated in the adoption of the American Declaration of the Rights and Duties of Man in 1948. Immediately after World War II, Western European states began to draft

their own rights lexicon, producing the European Convention on Human Rights in 1950. In this same period, discussions at the United Nations centered on a convention to outlaw genocide, a global freedom of information covenant, renewed attention to the Geneva Convention's protections for the rights of non-combatants in times of war, protective rights of asylum for refugees and the adoption of legally binding guarantees of the political, economic and social rights enshrined in the Universal Declaration.[13]

The United States did not stand apart from these developments. American state and non-state actors were intensely involved in the construction of this new global rights order from the outset in ways that would become deeply intertwined with domestic racial politics. While rights talk has been embedded in U.S. political discourse for much of its history, the idea of "human rights" and its transnational iterations only gained currency and power during World War II. With President Franklin D. Roosevelt's "four freedoms" State of the Union address in January 1941, and its sweeping conclusion that "freedom means the supremacy of human rights everywhere," the global articulation and enforcement of human rights became a central war aim of the United States.[14] Throughout the wartime period, a host of domestic religious, legal, labor and civil rights organizations joined the Roosevelt Administration in placing the global protection of human rights at the forefront of an imagined postwar international order.

But if American leadership was critical, it was also marked by contradictions and ambiguities. Official rhetorical commitments by the American state to global human rights protections lay in uneasy contrast to the fierce opposition of many white southerners, and the shallowness of some white liberal commitments, to the African-American struggle for human rights at home. Along with the influence of a vocal

minority of American conservatives who viewed all almost international commitments with suspicion, the lingering potency of racism in wartime and postwar America and its political valences could prompt reticence on the part of policymakers over how far global rights norms could intrude in American domestic space.[15]

The drafting of the human rights provisions of the UN Charter, which became so central to the claims of the global rights cases of the late 1940s, reflects both the potentialities and hesitations of official American engagement in global human rights politics. At the San Francisco conference that brought the UN into being in 1945, the American delegation, under heavy pressure from domestic groups that strongly favored international guarantees of human rights as well as actors in Western Europe and the global South, proposed the provisions that put human rights at the center of the UN Charter. The language of the perambulatory Article 1 in which member states pledged "respect for human rights and fundamental freedoms for all" and Article 55, which guaranteed freedom from discrimination "without distinction as to race, sex, language or religion," were the product of these efforts. But concerns about the conservative and racialist backlash that these provisions might produce at home and fears by the European powers that the Charter's human rights language could be employed by anticolonial movements against them to hasten the end of empire prompted the American delegation to introduce language that promised "nothing in the Charter should authorize…intervention in matters that are essentially within the domestic jurisdiction of any state," what would become Article 2(7) of the Charter. [16]

But what in fact would "essentially" come to mean? At the close of World War II, the relationship between the emergent global rights order outlined in the Charter,

particularly its insistence that member states protect the individual rights of all their citizens, and its domestic jurisdiction clause remained open. The Charter's articulation of global rights norms, some contemporary observers inside and outside the United States believed, offered at least the possibility of rethinking the bounds of sovereignty.

Indeed in an episode that ran parallel to the global rights cases in the United States such rethinking brought the successful efforts of the Indian delegation at the United Nations in 1946 to win the support of the General Assembly for a resolution that criticized the South African government's passage that year of the Asiatic Land Tenure and Indian Representation Act for its discriminatory treatment of the country's Indian population. The ironies here ran especially deep. The South African Premier Field Marshal Jan Smuts, who had in fact helped to draft the human rights language in the preamble of the UN charter apparently never dreaming it would have any implications for his own government (or for that matter any substantive implications at all), insisted that the domestic jurisdiction clause prevented UN discussion of or action on the treatment of Indians in South Africa. But in the event after tense and sustained debate, India's argument that the General Assembly could hear and rule on cases like this one that violated charter human rights language won the day by a two-thirds majority of Assembly members.[17]

It was in this liminal postwar moment –when articulations of rights and sovereignty were both in play at the intersection of the domestic and the transnational in the United States and elsewhere around the globe– that the petitioners in the American global rights cases and the judges that heard them favorably acted to harness the potentialities of international human rights guarantees and more relaxed conceptions of

national sovereignty to combat racial discrimination in the United States. If no single legal opinion brought a full resolution to the proper bounds of sovereignty and global norms in domestic rights practices in this period, a substantial number of state and federal courts, and in one case several Supreme Court justices, proved receptive to the claims of the petitioners. These juridical responses reveal the horizons of possibility in the late 1940s for articulating looser constructions of state sovereignty in cases of domestic racial discrimination, from a willingness to grant moral if not legal authority to transnational rights guarantees to a full embrace of the controlling power of the UN Charter's human rights provisions for American state and federal law.[18]

The softest interpretation of the relationship between global rights norms and sovereignty emerged in the Michigan Supreme Court's May 1948 decision in *Sipes v. McGhee*. The majority opinion was particularly concerned with sorting out the efficacy of the various "public policy" arguments, including those based on the UN Charter, against racial covenants made by the McGhees' lawyers and in *amicus* briefs. Ultimately the court was willing to acknowledge no more than their suasive powers. In the end, the Michigan court let racial covenants stand, rejecting both transnational and national public policy arguments.[19]

In several other cases, however, judges and legal scholars were willing to grant more binding authority to UN Charter human rights provisions. The relevance of the UN Charter and a changing international climate for domestic public policy emerged in the response of Ernest A. Gross, the U.S. Department of State Legal Adviser, to Attorney General Tom Clark's questions in November 1947 about the use of human rights provisions from the UN Charter in the Justice Department's appellant and *amicus* briefs

in *Shelley v. Kraemer* and *Sipes v. McGhee*. Goss argued that the Charter did not impose "a legal obligation to guarantee observance of specific human rights and fundamental freedoms without distinction as to race, sex, language or religion." But at the same, he suggested "the various Charter references to human rights…do indicate the general public policy of the United States." Moreover, he pointed out that "the United States has been embarrassed in the conduct of foreign relations by acts of discrimination taking place in this country….These matters assume greater importance to our foreign policy by virtue of the fact that human rights now constitute an important field of activity in the United Nations."[20]

Three opinions brought even more forceful articulations of the controlling authority of global human rights norms for domestic practices. In the Japanese land rights case *Oyama v. California*, the majority opinion of the U.S. Supreme Court in 1948 did not make reference to Charter arguments, but two concurrences strongly supported striking down the Alien Land Law in part because it violated Charter human rights obligations. In his concurrence Justice Hugo Black specifically referred to article 55 of the UN Charter, asking "[H]ow can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"[21] Justice Frank Murphy's concurrence put the case even more strongly, arguing

> [T]his nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights….The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned….It is an unhappy facsimile, a disheartening reminder, of the racial policy pursued by those forces of evil whose destruction recently necessitated a devastating war.[22]

In its claim that a higher law trumped American federal and state law in case of domestic racial discrimination, the opinion in another Japanese land rights case, *Sei Fuji v. California*, was the most muscular assertion in this period of the controlling power of international norms. In an April 1950 unanimous opinion, the court argued:

> [D]iscrimination against a people of one race is contrary to both the letter and to the spirit of the Charter which, as a treaty, is paramount to every law of every state in conflict with it. The Alien Land Law must therefore yield to the treaty as the superior authority. The restrictions of the statute based on eligibility to citizenship, but which ultimately and actually are referable to race or color, must be and are therefore declared untenable and unenforceable.[23]

Performative Sovereignty

If these cases help thicken the real and imagined potentialities of an emergent global human rights order in an American context, they also reveal with greater analytical precision –from the bottom up *and* the top down–the forces that prompted the American state in the 1950s to retreat from deeper engagement in transnational rights politics. Within days of the announcement of California court's decision, it was denounced on the floors of the U.S. House and Senate.[24] "Our sovereignty," Representative Paul Shafer (R-MI) told his colleagues in one typical response, "is too sacred to be tossed away for a mess of international pottage." In the Senate, several members deplored the decision for opening up to Congress the right to legislate issues they believed the Constitution reserved to the states, among them "suffrage, schools, segregation, poll tax, freedom from seizure."[25] Frank Holman, the president of the American Bar Association, attached almost apocalyptic significance to the opinion, arguing that *Sei Fuji* essentially allowed a foreigner, the United Nations, to become the President and threatened to turn the U.S. government "from a republic to a socialistic and centralized state."[26]

Ultimately, *Sei Fuji* and the global rights cases of the late 1940s emerged as powerful symbolic vehicles through which proponents of what became known as the Bricker Amendment sought to severely limit U.S. participation in the global human rights order. In 1951 Senator John Bricker (R-OH) introduced a resolution opposing the draft UN International Covenant on Human Rights, an effort to give international legal teeth to the largely aspirational Universal Declaration on Human Rights. The Covenant, Bricker argued, "would be more appropriately entitled as a Covenant on Human Slavery or subservience to government. . . . [T]hose who drafted the Covenant on Human Rights repudiated the underlying theory of the Bill of Rights-freedom to be let alone."[27] At the same time, Bricker cited *Sei Fuji* as evidence of the ominous potential of UN to affect unwanted changes in American domestic policy.[28]

In early 1952, Bricker decided the grave peril these cases and the Covenant presented to American sovereignty and values required recourse to a constitutional amendment that severely constrained the treaty making power of the President. The voluminous hearings held on the Bricker amendment in 1952 and 1953 are a particularly rich site for capturing the nature of American opposition to transnational intrusions on domestic policy and rights questions. Laced throughout these discussions and debates, Senator Bricker –along with his allies in the Republican Party, the American Bar Association and a host of conservative organizations– made frequent reference to *Fuji* and other global rights cases as emblematic of the transnational assault on "existing laws which are in our Bill of Rights and our Constitution, thereby forcing unacceptable theories and practices upon the citizens of the United States of America." The UN draft convenant on human rights was also denounced in testimony as "utter nonsense," "a

blueprint for tyranny," and the "greatest threat to American sovereignty."[29] In these hearings, the global rights cases and the draft UN Covenant emerged as markers and accelerators of more deeply rooted conservative suspicions of the "international" and "big government statism" and of efforts to preserve the sensibilities and practices of Jim Crow segregation in the postwar period.[30]

The unfolding of opposition to the assertion of global rights norms in an American context as it emerged in the very public hearings in the U.S. Senate on the Bricker Amendment are best viewed as a performance of sovereignty. In making this claim I build upon arguments inspired by the work of Giorgio Agamben and Judith Butler, particularly what some scholars of the state have called the necessity of "repeated performances of sovereignty" to mask its inherent instability.[31] In their often shrill insistence on the naturalness of American state set apart from the global processes that surround it, the Bricker Amendment hearings betrayed the essential brittleness of such imagined constructions of sovereignty.[32]

It is hard to imagine a person better suited for the performance of sovereignty than John Bricker, the junior Republican Senator from Ohio. A bombastic orator who recalled the Midwest of Sinclair Lewis's *Babbitt*, Bricker was one of the most outspokenly conservative members of the Senate.[33] In stage-managing the hearings surrounding his amendment, Bricker sought testimony from such reliable conservative allies as the Chamber of Commerce, the American Flag Committee and the Daughters of the American Revolution along with the American Bar Association. He also presented a variety of notionally plain-spoken Americans from the heartland who voiced their shared outrage at the threats to sovereignty posed by global rights norms.

Although ultimately if narrowly defeated, the Bricker Amendment prompted a public pledge by the Eisenhower Administration in the spring of 1953 that the United States would opt out of further participation in human rights treaty making in the United Nations and the promise to withdraw the Genocide Convention and other pending international human rights instruments from consideration for ratification by the U.S. Senate. Both President Dwight Eisenhower and Secretary of State John Foster Dulles viewed Senator Bricker with some distaste and the Administration vigorously opposed the Bricker Amendment in large measure because of its broader challenge to the authority of executive branch in making foreign policy.

In doing so, however, the Eisenhower Administration embraced the performative dimensions of the Bricker hearings to undercut the potential political potency of the human rights and sovereignty arguments of Bricker and his supporters. In his testimony to the Senate subcommittee that revealed Eisenhower would not sign any UN human rights treaty (now or ever!), Dulles said "[w]e do not ourselves look upon a treaty as a means which we would now select as the proper and most effective way to spread throughout the world the goals of human liberty." The Administration, he continued in a reference to the global rights cases of the late 1940s and early 1950s, welcomed "a reversal of the trend toward trying to use the treaty-making power to effect internal social changes."[34]

If Bricker and his allies were successful in forcing what would become an almost three decade long official disinterest in the promotion of global human rights norms, a final case from this period suggests the persistence of transnational rights sensibilities at the local and non-state level and the fragilities of performative sovereignty. *Rice v. Sioux*

City Memorial Cemetery, Inc. emerged in 1953 in the wake of the death of Sergeant John Rice in the Korean War and on the eve of the Bricker inspired Eisenhower Administration's rejection of international human rights norms. Rice's widow had entered into a contract with the Sioux City cemetery for his burial. At the grave side services, several cemetery officials noted a number of Native-American mourners and suspected Rice himself might have been Native-American. They visited his widow who told them their assumption was correct. The cemetery, with a "Caucasians only" burial policy, ordered her husband's body removed.

The action drew immediate and national attention, prompting President Truman to intervene and arrange for Rice to be buried at Arlington National Cemetery. Not placated by Truman's symbolic gesture, Rice's widow sued in Iowa courts in part on UN charter grounds. When the Iowa Supreme Court dismissed the case, ruling the Charter's human rights provisions "had no application to the private conduct of individual citizens of the United States,"[35] she took her case to the U.S. Supreme Court. In their brief for the Supreme Court, Rice's lawyers dealt at some length on Charter inspired claims arguing that the Iowa court had "violated the basic and very fundamental concepts of equality not only announced but also pledged by the United Nations Charter and all of the member nations of which the United States is one.[36]

The Supreme Court, after initially suggesting otherwise, declined to hear the case and it was dismissed in 1955. But the persisting use of UN human rights claims by Rice's widow and her lawyers even after the Bricker Amendment controversy and the Eisenhower Administration's response to it appeared to make clear an official hostility to

international human rights guarantees offers a window into what would become a new global politics of human rights in the 1970s, one in which advocacy and suasion by non-state actors came to challenge and ultimately transcend official state intransigence on transnational rights questions. While the human rights crusades of the 1940s were a less central part of international discourse for much of the 1950s and 1960s, they re-emerged with a vengeance in the 1970s: the florescence of Amnesty International and its Nobel prize in 1977, the claims for political and civil rights among dissidents in the Soviet Union, the Helsinki accords, the Charter 77 movement in Eastern Europe, U.S. Congressional prohibitions in the United States against aid to the worst state violators of human rights, Carter human rights diplomacy and transnational campaigns against human rights abuses in Latin America and apartheid in South Africa, to name just a few, were all products of this moment.[37]

It is important to note this recovery of global human rights talk in the United States was largely oriented outward toward, naming and shaming human rights violations in other places. The kinds of appropriations of global rights norms to overcome domestic discrimination that were so much a part of American human rights moment in the late 1940s generally didn't reappear in this period, although they clearly did almost everywhere else in the world. But in the 1990s and more recently, some of the domestic sensibilities of the 1940s did and do re-emerge in the U.S. context. The contemporary moment recalls the tensions in American engagement with global human rights from this earlier period. On the one hand, the Supreme Court (or at least a majority of the Court) has been increasingly open to using transnational norms to consider domestic rights questions as its opinion in the 2003 *Lawrence v. Texas* case and others suggests.[38] And

yet, the Bush Administration's willingness to abrogate international norms about torture – among other developments– suggests the lingering potency of Brickerite sensibilities from the 1950s. Although as some legal scholars have begun to argue, Bush policy may have in the end had quite the opposite effect intended by its architects: instead of drawing the United States away it has appeared to more deeply enmesh the United States in global rights norms.[39]

A focus on global processes for understanding the American global rights cases of the late 1940s and early 1950s, and U.S. rights talk more generally, does pose at least one serious interpretative dilemma: how to simultaneously locate actors at the intersection of the local and the sometimes distant and elite transnational space of the global human rights order in a way that flattens neither plane of meaning and significance and is sensitive to questions of multiple agency and differentials of power. But in fact these tensions are analytically productive ones, and get at what the cultural anthropologist Anna Tsing recently termed the interpretatively rich point of friction between the global and the local.[40] Friction between and among a variety of American actors abounds in 1940s --whether it be the impact of transnational human rights norms on an African-American couple about to lose their home, a widow of a Native-American soldier who served and died in the Korea war, or the bombastic Senator John Bricker of Ohio—as it does in the policies of the American state and the accelerating non-state campaigns of transnational human rights advocacy in the 1970s. Uncovering such frictions makes real the richness, and the limits, of American engagement in the twentieth century global human rights imagination.

NOTES

[1] My discussion of the particulars of the McGhee case relies upon *Sipes v. McGhee*, 316 Mich. 614, 25 N.W.2d 638; and Clement E. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (Berkeley: University of California Press, 1959): ch. 6.
[2] Brief for the Appellants, *Sipes v. McGhee*; the brief reproduces the decision of the Ontario High Court *In Re Drummond Wren* (4 D.L.R. 1945) in Appendix B; State of Michigan Archives.
[3] My consideration of the particulars of the Oyama case is informed by: *Oyama v. California*, 29 Cal.2d 164, 173 P.2d 794; *Oyama v. California*, 332 U.S. 633; and Frank F. Chuman, *The Bamboo People: The Law and Japanese Americans* (Del Mar, CA: Publishers Inc, 1976): ch. 12.
[4] Brief for the Petitioners, *Oyama v. California*, California State Archives.
[5] Brief for the Japanese American Citizens League as *amicus curiae*, *Oyama v. California*; Folder 2, Box 539, Frank F. Chuman Papers, Special Collections, Young Research Library, UCLA. Brief for ACLU as *amicus curiae, Oyama v. California*, California State Archives.
[6] In addition to *Sipes* and *Oyama*, among them are: *Barrows v. Jackson*, 346 U.S. 249 (1953), *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948), *Bolling v. Sharpe*, 347 U.S. 497 (1954), *Henderson v. United States*, 339 U.S. 816 (1950), *Hurd v. Hodge*, 82 U.S. App. DC 180, 162 F.2d 233, *Namba v. McCourt*, 185 Ore. 579, 204 P.2d 569, *Sei Fujii v. California*, Superior Court of Los Angeles County, 24 April 1950, *Shelley v. Kraemer*, 355 Mo. 814, 198 S.W.2d 679, *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949), *Sweatt v. Painter*, 339 U.S. 629 (1950), and *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948). The only work I have encountered that considers the connections between these cases and global human rights issues is Bert J. Lockwood, Jr., "The United Nations Charter and United States Civil Rights Litigation: 1946-1955," *Iowa Law Review* 69(1983-1984): 901-56. Although Lockwood's analytical concerns are somewhat different than my own, his essay was foundational for my examination of them. My thinking about the vectors of more expansive genealogies for these cases is in part informed by Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006).
[7] Important exceptions include Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge: Harvard University Press, 2005); Carol Anderson, *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-55* (Cambridge: Cambridge University Press, 2003); and Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001). On power of American exceptionalism for thinking about global human rights issues, see the contributors to Michael Ignatieff, *American Exceptional and Human Rights* (Princeton: Princeton University Press, 2005).
[8] Minutes of Meeting, "NAACP Lawyers and Consultants on Methods of Attacking Restrictive Covenants," Chicago, IL, 9-10 July, 1945, Papers of the NAACP.
[9] *To Secure These Rights: The Report of the President's Committee on Civil Rights* (New York: Simon and Schuster, 1947): 110-12. See also Proceedings of the Committee-Transcripts, Boxes 14-16, Records of the President's Committee on Civil Rights, Record Group 220, Harry S. Truman Library.
[10] Non-state organizations filed briefs with UN Charter claims in the following cases: *Bob-Lo Excursion Co. v. Michigan* (NAACP, ACLU, National Lawyers Guild); *Henderson v. United States* (American Veterans Committee); *Hurd v. Hodge* (NAACP, Japanese American Citizens League); *Oyama v. California* (ACLU, National Lawyer's Guild); *Shelley v. Kraemer* (NAACP, Civil Liberties Department of the Grand Lodge of Elks, National Lawyers Guild, B'nai B'rith, American Indian Citizens League of California, ACLU, American Association for the United Nations, American Unitarian Association, Congress of Industrial Organizations); *Sweatt v. Painter* (American Jewish Committee, B'nai B'rith); *Takahashi v. Fish and Game Commission* (NAACP, American Veterans Committee, American Jewish Congress, National Lawyers Guild, ACLU).
[11] Brief for the United States as *Amicus Curiae, Shelley v. Kraemer, et al*, December 1947 in *Prejudice and Property: An Historic Brief Against Racial Covenants* (Washington DC: Public Affairs Press, 1948): 70-74.
[12] See Jacquelyn Dowd Hall, "The Long Civil Rights Movement and the Political Uses of the Past," *Journal of American History* 91.4(March 2005): 1233-63; Risa Goluboff, *The Lost Origins of Civil Rights* (Cambridge: Harvard University Press, 2007); and Zaragosa Vargas, *Labor Rights are Civil Rights: Mexican American Workers in Twentieth-Century America* (Princeton: Princeton University Press, 2005).

[13] The history of this global normative human rights revolution is just beginning to be written. In addition to Borgwardt and Glendon, see Kenneth Cmiel, "Human Rights, Freedom of Information, and the Origins of Third-World Solidarity," in *Truth Claims: Representation and Human Rights*, edited by Mark Philip Bradley and Patrice Petro (New Brunswick: Rutgers University Press, 2002): 107-30; A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001); *Human Rights in the Twentieth Century*, edited by Stefan-Ludwig Hoffmann (Cambridge: Cambridge University Press, 2011); and *The Human Rights Revolution: An International History*, edited by Akira Iriye, Petra Goedde and William I. Hitchcock (New York: Oxford Unviersity Press, 2011). For a somewhat more skeptical perspective on these developments, see Mark Mazower, "The Strange Triumph of Human Rights, 1933-1950," *The Historical Journal* 47.2 (June 2004): 379-98; and Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press, 2010).

[14] Franklin D. Roosevelt, "Address to Congress," 6 January 1941, *Congressional Record* (1941), Vol. 87, Pt. 1.

[15] On American engagement in global human rights politics during World War II, see Borgwardt, *New Deal for the World*, chs. 5 and 6; Anderson, *Eyes Off the Prize*: introduction and ch. 1; Rowland M. Brucken, "A Most Uncertain Crusade: The United States, Human Rights and the United Nations, 1941-1954" (Ph.D. dissertation, The Ohio State University, 1999); chs. 1-3; and Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution* (New York: Basic Books, 2004).

[16] Charter of the United Nations, http://www.un.org/en/documents/charter; accessed 15 March 2010. For a penetrating discussion of the charter's drafting and its human rights provisions, see Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press, 2009): ch. 1.

[17] On the Indian case, see Official Records of the General Assembly, *Plenary Meeting of the General Assembly Verbatim Records, 23 October-16 December 1946*: 1006-1061; Official Records of the General Assemby, *Jt. Committee of the First and Sixth Committees Summary Record of Meetings, 21-30 November 1946*; Lorna Lloyd, "'A Most Auspicious Beginning': the 1946 United Nations General Assembly and the Question of the Treatment of Indians in South Africa," *Review of International Studies* 16(1990): 131-53; and Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press, 2009): ch. 4.

[18] My approach to these opinions is shaped in part by Ronald Dworkin's contention that "legal reasoning is an exercise in constructive interpretation." See his *Law's Empire* (Cambridge: Harvard University Press, 1986).

[19] *Sipes v. McGhee*, Supreme Court of Michigan, 3 May 1948, 316 Mich. 614, 25 N.W.2d 638.

[20] Gross to Clark, 4 November 1947, Box 89, Office of the Legal Advisor, Division of United Nations Affairs, 1945-59, U.S. Department of State, Lot File 62D204, National Archives, Washington DC. Several prominent independent legal scholars came to similar conclusions. See, for instance, Paul Sayre, "Shelley v. Kraemer and United Nations Law," *Iowa Law Review* 34(November 1948): 1-11; and Quincy Wright, "National Courts and Human Rights—The Fuji Case," *American Journal of International Law* 45(January 1951): 62-82.

[21] Oyama v. California, Black concurring, 332 U.S. 650 (1948).

[22] *Oyama v. California*, Murphy concurring, 332 U.S. 673 (1948). The draft memorandums of Murphy's concurrence, which changed substantially over time, all reveal the presence of Charter based human rights arguments; Frank Murphy Papers, Library of Congress.

[23] *Sei Fuji v. California*, Superior Court of Los Angles County, 24 April 1950, pp. 9, 13,20, 21; California State Archives.

[24] See, for instance, U.S. Congress, House of Representatives, 81st Cong., 2nd sess., 24 April 1950, *Congressional Record*, 96: A3108; U.S. Congress, Senate, 81st Cong., 2nd sess., 28 April 1950, *Congressional Record*, 96: 5996.

[25] U.S. Congress, House of Representatives, 81st Cong., 2nd sess., 24 April 1950, *Congressional Record*, 96: A3108; U.S. Congress, Senate, 81st Cong., 2nd sess., 28 April 1950, *Congressional Record*, 96: 5996.

[26] Frank Holman, "Treaty-Law Making: A Blank Check for Writing a New Constitution," *American Bar Association Journal* 36(September 1950): 788.

[27] *Congressional Record*, Senate, 1951: 8255.

[28] *Congressional Record*, Senate, 1951: 8261-8262.

[29] U.S. Congress, Senate, Committee on the Judiciary, Treaties and Executive Agreements, *Hearings*, 82nd Congress, 2nd session, 1952. See also U.S. Congress, Senate, Committee on the Judiciary, Treaties and Executive Agreements, *Hearings*, 83rd Congress, 1st session, 1953.

[30] The best existing account of the human rights dimension of the Bricker Amendment controversy is Natalie Hevener Kaufman, *Human Rights Treaties and the Senate: A History of Opposition* (Chapel Hill: University of North Carolina Press, 1990: ch. 4. See also Duane Tanabaum, *The Bricker Amendment Controversy* (Ithaca: Cornell University Press, 1988). For an important broader discussion of conservative visions of the state, and the problematics of American liberal responses to them, in the immediate postwar period, see Jonathan Bell, *The Liberal State on Trial: The Cold War and American Politics in the Truman Years* (New York: Columbia University Press, 2004).

[31] Thomas Blom Hansen and Finn Stepputat, *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* (Princeton: Princeton University Press, 2005): 3. See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1988); Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, 2nd ed. (New York: Routledge, 2006); and the contributors to *Sovereign Bodies*.

[32] The conservative campaign against the Genocide Convention in the Senate hearings on ratification held in 1950 exhibits a similar performance of sovereignty. See U.S. Congress, Senate, Committee on Foreign Relations, *The Genocide Convention: Hearings*, 81st Cong., 2d session, 1950.

[33] On Bricker himself, see Richard O. Davies, *Defender of the Old Guard: John Bricker and American Politics* (Columbus: Ohio State University Press, 1993).

[34] U.S. Congress, Senate, Committee on the Judiciary, Treaties and Executive Agreements, *Hearings*, 83rd Congress, 1st session, 1953: 124. On Eisenhower and Dulles' antipathy to Bricker and the Administration's opposition to the Bricker Amendment, see *Foreign Relations of the United States 1952-1954, Vol 1: General, Economic and Political Matters, Part 2* (Washington DC: US Government Printing Office, 1983): 1768-1858.

[35] *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 60 N.W. 2d 116-17 (1953).

[36] Brief in support of petition for writ of *certiorari* to the United States Supreme Court at 18-19.

[37] For broad sketches of these developments in a global context, see Akira Iriye, *Global Community: The Role of International Organizations in the Making of the Contemporary World* (Berkeley: University of California Press, 2002); Ann Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton: Princeton University Press, 2001); Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998); and Sarah B. Synder, *Human Rights Activism and the End of the Cold War: A Transnational History of the Helsinki Network* (Cambridge: Cambridge University Press, 2011). On their impact in the United States, see Kenneth Cmiel, "The Emergence of Human Rights Politics in the United States," *Journal of American History* 86 (December 1999): 1249-50; Kathryn Sikkink, *Mixed Signals: U.S. Human Rights Policy and Latin America* (Ithaca: Cornell University Press, 2004); and James N. Green, *We Cannot Remain Silent: Opposition to the Brazilian Military Dictatorship in the United States* (Duke: Duke University Press, 2011); and the 1970s era contributors to *Human Rights Revolution: An International History*. Also important is the forthcoming work of Carl Bon Tempo and Jan Eckel, and contributors to a volume in press based on a conference held in June 2010 at the Institute for Historical Study in Freiburg on human rights politics in the 1970s.

If pieces of the puzzle of global human rights history in the 1970s and beyond are now being put into place in an increasingly sophisticated scholarship, we still don't know where the ubiquitous presence of human rights talk in this period really came from. There are, however, some intriguing hypotheses. In one view the collapse of competing utopias in the 1970s –whether socialist internationalism in Europe, the liberal Cold War order in the United States or the emancipatory discourse of Third Worldism– opened up a space in which a variety of local actors from American presidents to Soviet dissidents and Latin American radicals began to see the transnational protection of human rights as a compelling form of anti-politics. A complementary though more structural explanation locates the transformations of the 1970s in the accelerating forces of globalization, most notably the emergent power of transnational finance and global civil society, that challenged the predominant political and economic statism of postwar international order. From this perspective the result was a world of complex interdependence in which traditional state geopolitics increasingly gave way to a new transnational politics of human rights, public health, the environment and the global economy. For the more ideational argument that sees human rights in the 1970s

as anti-politics, see Moyn, *The Last Utopia*. The structural approach to the transformations of the 1970s emerges in Daniel Sargent, *From Internationalism to Globalism: The United States and the Transformation of International Politics in the 1970s* (Ph.D. Thesis, Harvard University, 2008).

[38] *Lawrence v. Texas*, 539 U.S. (2003). See also *Roper v. Simmons*, 543 U.S. (2005); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Knight v. Florida*, 528 U.S. 997 (1999); *U.S. v. Prinz*, 521 U.S. (1997); and *Atkins v. Virginia*, 536 US 304 (2002).

[39] For one entry point into the competing views of the place of what is sometimes termed "foreign law" in the American context, compare David Cole, *Justice at War* (New York: New York Review Books, 2009) and Eric A. Posner, *The Perils of Global Legalism* (Chicago: University of Chicago Press 2009).

[40] See Anna Lowenhaupt Tsing, *Friction: An Ethnography of Global Connection* (Princeton: Princeton University Press, 2004).